INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Contract and regulation provisions involved	3
Statement	3
Specification of errors to be urged	16
Summary of argument	17
Argument	22
I. The dispute concerned a question of fact	24
A. The nature of the question in dispute shows that it is factual	25
B. Consistent holdings by the courts and administrative agencies confirm the view that the question is factual	27
II. The Board of Contract Appeals' determination of the $980,000 claim is therefore final and binding	31
III. The second contracting officer's unappealed determination of the 1¼ million dollar claim is likewise final and binding	33
A. The first contracting officer's initial approval of the 1¼ million dollar claim was not conclusive	35
1. The express terms of Article 16 show that the first contracting officer's approval was not a decision under Article 16	35
2. Nothing in Article 3(b) of the contracts makes the first contracting officer's initial approval final and conclusive	38
3. "Finality" clauses are intended to prevent judicial review of administrative action rather than the administrative agency's correction of its own error	39
B. Since respondent ignored the agreed procedure for settlement of disputes, it has no standing to sue for damages based on such disputes	42
IV. In any event, the determination by the second contracting officer and the Board of Contract Appeals that the deferred charges were not reimbursable was correct and that of the court below erroneous	45
Conclusion	50
Appendix	51

Cases:

	Page
Block Coal & Coke Co. v. *United Mine Workers*, 177 Tenn. 247, 148 S.W. 2d 364	35
Chester Distributing Co. v. *Commissioner*, 184 F. 2d 514	28
Chicago S.F. & C.R. Co. v. *Price*, 138 U.S. 185	22
Chrysler Corporation, 1 CCH Contract Cases Fed. 162	29
City Ice Delivery Co. v. *United States*, 176 F. 2d 347	28
Commissioner v. *Heininger*, 320 U.S. 467	28
Commissioner v. *Swedish American Investment Co.*, 323 U.S. 119	28
Douglas Aircraft Company, Inc., 3 CCH Contract Cases Fed. 1570	29
Heidt v. *United States*, 56 F. 2d 559, certiorari denied, 287 U.S. 601	41
Hercules Powder Co. v. *Army*, 4 OCSAB Cases 94	36, 37
Hercules Powder Co. v. *Army*, 4 OCSAB 218	37
Hudson Motor Co. v. *Navy*, 2 OCSAB Cases 39	37
Johnson v. *United States*, 102 F. 2d 729	35
Kihlberg v. *United States*, 97 U.S. 398	22, 40
Leyerly v. *United States*, 162 F. 2d 79	35
Martinsburg & P.R. Co. v. *March*, 114 U.S. 549	22
Mathis Co. v. *United States*, 79 F. Supp. 703	42
Merrill-Ruckgaber Co. v. *United States*, 241 U.S. 387	22
Miners' General Group v. *Hix*, 123 W. Va. 637, 17 S.E. 2d 810	35
Missouri-Kansas Pipe Line Co. v. *Commissioner*, 148 F. 2d 460	28
Morgan v. *Hines*, 113 F. 2d 849	40, 42
McDonald v. *Commissioner*, 323 U.S. 57	28
Northrop Aircraft, Inc., 3 CCH Contract Cases Fed. 1273	29
Northwest Airlines, Inc. v. *Army*, 4 OCSAB Cases 20	37, 38
Peerless Stages v. *Commissioner*, 125 F. 2d 869	28
Plumley v. *United States*, 226 U.S. 545	22
Robinette, In re, 211 Minn. 223, 300 N. W. 798	35
Shaull v. *United States*, 161 F. 2d 891	35
Sweeney v. *United States*, 109 U.S. 618	22
Thrasher v. *United States*, 132 F. 2d 747	35
Trust of Bingham v. *Comm'r*, 325 U.S. 365	28
United Air Lines, Inc., 3 CCH Contract Cases Fed. 1497	29
United States v. *Bentley*, 107 F. 2d 382	40, 41
United States v. *Beuttas*, 324 U.S. 768	22
United States v. *Blair*, 321 U.S. 730	22, 43, 44
United States v. *Burchard*, 125 U.S. 176	41
United States v. *Callahan Walker Const. Co.*, 317 U.S. 56	22, 28, 43, 44
United States v. *Gudewicz*, 45 F. Supp. 787	40, 42

Cases—Continued

	Page
United States v. *Holpuch Co.*, 328 U.S. 234	22, 43, 44
United States v. *Mason & Hanger Co.*, 260 U.S. 323	39
United States v. *Moorman*, 338 U.S. 457	22, 39, 40
United States v. *McShain, Inc.*, 308 U.S. 512	22
United States v. *Sutton Chemical Co.*, 11 F. 2d 24	41
United States v. *Wunderlich*, 342 U.S. 98	22, 28, 32, 33
United States v. *Wurts*, 303 U.S. 414	41
Wisconsin Central R.R. v. *United States*, 164 U.S. 190	41

Statutes:

Internal Revenue Code:	
Section 23(a)	28
Vinson-Trammel Act of March 27, 1934, as amended by the Acts of June 25, 1936, April 3, 1939, and June 28, 1940 (48 Stat. 505, 49 Stat. 1926, 53 Stat. 560, 54 Stat. 677; 50 U.S.C. App. 1153)	25

Regulations:

T.D. 5000, 26 C.F.R. 26.9 (1940 Supp.)	25, 30, 52

Miscellaneous:

Determination of Cost in Military Procurement Cost-Plus-A-Fixed-Fee Contracts, 65 Harv. Law Review 1035	30

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 13

THE UNITED STATES, PETITIONER

v.

BELL AIRCRAFT CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 101-135) is reported at 120 C. Cls. 398.

JURISDICTION

The judgment of the Court of Claims was entered on October 2, 1951 (R. 135). On December 29, 1951, the Chief Justice extended the time for filing a petition for certiorari to and including January 30, 1952 (R. 136). The petition, filed on that date, was granted on March 31, 1952 (R. 139). The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

Respondent claimed approximately 1¼ million dollars and, later, an additional and separate

amount of $980,000, for reimbursement of certain costs under its cost-plus-a-fixed-fee contracts with the United States.

The questions presented are:

1. Whether the determination that the claimed costs were not incurred incident to and necessary for the performance of the cost-plus-a-fixed-fee contracts was a determination of fact within the standard form contract provision that administrative decisions "on all disputes concerning questions of fact * * * shall be final and conclusive upon the parties * * *."

2. Whether the Court of Claims may set aside such an administrative determination in favor of the Government as to the $980,000 claim and substitute its own judgment for that of the administrative agency.

3. Whether a similar determination with respect to the 1¼ million dollar claim, made after that claim had been initially allowed but later recouped, is final and binding in the absence of an appeal to the department head or his representative in accordance with the standard provisions of the contracts.

4. Whether the provision in the contracts stating that "allowable items of cost will be determined by the contracting officer" and containing no language giving his determination finality makes the initial allowance of the 1¼ million dollar claim final and

prevents a successor contracting officer from recouping and disallowing that claim.

5. Whether, under the foregoing provision, the Court of Claims had any warrant in holding conclusive the initial allowance of the 1¼ million dollar claim in favor of the contractor, while denying conclusiveness to the successor contracting officer's disallowance of the $980,000 claim in favor of the Government.

6. Whether, assuming the question was properly before it for decision, the Court of Claims erred in awarding reimbursement, under cost-plus-a-fixed-fee contracts, for items which the parties understood, when the contracts were entered into, would not be claimed as reimbursable costs.

CONTRACT AND REGULATION PROVISIONS INVOLVED

The pertinent portions of the contract and regulation provisions are set forth in the Appendix, infra, pp. 51-56.

STATEMENT

This action arises out of respondent's claims for reimbursement of certain costs under its cost-plus-fixed-fee (CPFF) contracts with the United States. The costs in question comprise about two-thirds of certain experimental, developmental and tooling expenses incurred by respondent some time prior to the entry into the CPFF contracts here in question. The issue which became the subject of a dispute between the United States and respondent was whether respondent, having initially charged

off those expenses in their entirety against certain fixed-price contracts not here involved, could reallocate those expenses between the two groups of contracts so as to recover a proportionate part of them as costs of the CPFF contracts which are in issue in the present case. An Army contracting officer and Board of Contract Appeals resolved that issue against respondent, refusing to allow any part of the claimed costs against the CPFF contracts. The Court of Claims allowed respondent the entire costs claimed by it, aggregating $2,286,819.95.

In 1936-1938, respondent, in four separate contracts, agreed to build 16 experimental or test fighter planes for the United States (R. 67). Three contracts called for delivery of 15 fighter planes to the Army Air Corps at a total fixed-price of $3,804,445. (R. 67). The fourth contract, also negotiated on a fixed price rather than CPFF basis, required delivery of the sixteenth plane to the Navy at a cost of $245,000 (R. 67). The total contract price thus paid to respondent for these 16 fighter planes aggregated $4,049,445, or an average of over $253,000 per plane (R. 67). However, in performing these four fixed-price contracts, respondent "incurred substantial expenditures over and above" the total contract price (R. 67). These excess expenditures, amounting to an additional $1,528,760.66, were labeled by respondent as "experimental and development costs" and set up on its books as deferred charges applicable to anticipated future produc-

tion (R. 35, 37, 38). Respondent deferred and capitalized these charges as follows (R. 69):

December 31, 1938	$ 128,052.77
December 31, 1939	511,776.21
December 31, 1940	888,931.68
	$1,528,760.66 [1]

On April 26, 1939, respondent entered into another contract with the Air Corps for the delivery of 14 additional service test models of the P-39 fighter plane at a fixed price of $1,073,445, or about $76,500 per plane (R. 70, 71). Thereafter, in 1939-1941, respondent was awarded several fixed-price production contracts by the Air Corps calling for the delivery of 952 P-39 fighter planes at a cost of about 36½ million dollars, or approximately $38,000 per plane (R. 71). During this same period, respondent also received additional fixed-price contracts from the British Government for the production of 810 P-39's for almost 34 million dollars (R. 71).

The mass production of this large quantity of planes for the United States and Great Britain required respondent to incur production tooling costs in 1939 and 1940 amounting to $1,894,109.57.[2]

[1] This was later adjusted to $1,499,739.23 after audit by the Army Audit Agency (R. 70).

[2] This was later adjusted to $1,874,725.77 after audit by the Army Audit Agency (R. 72). Production tooling differs from ordinary machine tools in that the latter, which consist of lathes and drill presses, can be adapted to many uses and are not restricted in use to the specific model or type of

In December, 1940, respondent added this sum to the deferred charges it had set up for the excess experimental and development costs and re-designated the account as "Experimental, Development and Production Tooling Expenses" (R. 72). By the end of 1942, respondent had fully amortized the entire amount of this account by charging all of the deferred production tooling costs and all of the deferred experimental and development costs in the account against deliveries of the P-39 planes in 1940 through 1942 under its fixed-price contracts with the United States and Great Britain (R. 76). Even after all of these deferred costs, which totalled over 3 million dollars, were so charged to the cost of the airplanes sold under the fixed-price contracts, respondent realized a net profit on these fixed-price contracts, before taxes and renegotiation of excess profits, of $18,280,732.50, or a profit of about 25 percent of the total value of $71,364,004.86 for these fixed-price contracts (R. 64, 71, 98).

In the meantime, between August 14, 1941, and April 13, 1945, respondent was awarded a series of CPFF contracts by the Air Corps for the production of over 10,000 additional P-39 planes at a total estimated cost of 307 million dollars plus a fixed fee of over 14 million dollars (R. 76-77). Three of the four contracts, calling for the production of over 5,000 planes, were entered into in 1941

---

product manufactured (R. 72). The production tooling for the P-39 plane was largely assembly line fixtures, and special blocks and dies which remained in use only as long as the P-39's were in production (R. 72).

and 1942, while respondent was still amortizing its experimental, development and tooling costs solely against the fixed-price contracts (R. 77). A fourth contract, and a substantial increase in one of the others, were entered into after those expenses had been completely amortized (R. 77).

In the course of the negotiations for the CPFF contracts it was understood by both parties that respondent did not intend to allocate any of the deferred costs against production under the CPFF contracts and therefore did not include any part of such costs in its cost estimates for those contracts (R. 76, 82, 125). Respondent's "Annual Report for 1940" described these deferred costs which amounted to over 3 million dollars "at December 31, 1940" and stated that the "Company is at present concentrating on the manufacture of Airacobras [P-39's], and it is the Company's intention to absorb the aggregate of the foregoing charges on the basis of the quantities of this model under contract" (R. 76). Respondent's "Annual Report for 1941", prepared after at least two of the CPFF contracts had been negotiated, reiterated that the "Experimental, Development and Production Tooling Expense" account of $3,352,096.78 had been deferred "at December 31, 1940, to be absorbed on the basis of certain quantities of aircraft under contract." (R. 76). No planes were under CPFF contract as of December 31, 1940 (R. 77). The only aircraft under contract as of December 31, 1940 were those called for under

the fixed-price contracts with the Air Corps and the British Government (R. 71).

In March, 1942, the Bureau of Internal Revenue audited respondent's income tax returns for 1941 and prior years and requested that respondent, "for income tax purposes," allocate the deferred experimental, development and tooling costs to all P-39 production under both the CPFF contracts and the fixed-price contracts (R. 49, 81). Respondent refused to comply and, as already noted, continued to amortize the deferred costs solely against the fixed-price contracts until the end of 1942, when all the costs were fully charged off to the fixed-price contracts (R. 76, 81-82). In September, 1942, respondent explained this refusal to comply with the Bureau's request by stating that (R. 82):

> This item [deferred experimental, development and production tooling costs] should be allowed as an amortization expense against the fixed price contracts only in view of the fact that *any amortization to be allowable under a cost-plus-fixed-fee contract would have to be included in the original negotiations of such contract. No provision is made for that on any of our cost plus contracts* in view of the position taken by the Government that prior to our entry into cost plus contracts we have received sufficient fixed price contracts to permit the amortization of deferred experimental expenses. [Italics supplied.]

The Bureau, however, adjusted respondent's income for 1941 and 1942 by allocating the deferred

charges to future P-39 production under the CPFF contracts as well as the P-39's delivered in 1941 and 1942 under the fixed-price contracts. This adjustment increased respondent's income for 1941 and 1942 and therefore increased its tax liability for those two years by $1,337,474.89. (R. 60). The same adjustment allowed deduction of a portion of the deferred charges against deliveries under CPFF contracts in 1943, 1944 and 1945 and therefore decreased respondent's taxes for those three years by $1,305,418.72. (R. 94). Thus, respondent's net tax liability was increased by only $32,056.17 as a result of the Bureau's reallocation of the deferred charges. (R. 60, 134).

In April, 1943, respondent's comptroller submitted to the Air Corps a statement of accounting policies pertinent to the company's operations under the CPFF contracts, reiterating that the deferred costs were chargeable only to fixed-price production (R. 82):

> Experimental, development and production tooling expenses are written off against the deliveries of the items to which expenditures apply. No experimental expense is charged to overhead applicable to CPFF contracts.

Six months later, respondent wrote to the Price Adjustment Office in charge of renegotiating respondent's excessive profits for 1942, proposing to reallocate its deferred charges as required by the Bureau of Internal Revenue "provided that the amounts disallowed by you against fixed price con-

tracts become items of reimbursable costs under our cost plus a fixed fee contracts and are allowed and reimbursed as such by the Contract Audit Section of the Army Air Forces and the General Accounting Office" (R. 83). The proposed reallocation would have increased respondent's excessive profits for 1942 by $667,000 and would have made respondent liable to refund that additional amount to the United States (R. 94).[3] The renegotiation agreement entered into between respondent and the United States for 1942 did not, however, compute respondent's excessive profits on the basis of the proposed reallocation. Instead, it allowed respondent to charge all of the deferred costs to the P-39's produced under the fixed-price contracts (R. 93-94). The agreement further provided that the proposed reallocation of deferred costs to CPFF contracts and fixed-price contracts "has been tentatively approved by the Army Air Forces," and (R. 94)

> * * * if the amount allocated to the CPFF Contracts is finally approved by both the Army Air Forces and the General Accounting Office of the Comptroller General of the United States, and reimbursement therefor, is made, the Contractor agrees to pay to the United States as an additional refund the sum of $667,000, on account of which the Contractor shall receive credit for Federal Income and Excess Profits Taxes thereon as determined by the Bureau of Internal Revenue * * *.

[3] Of course, the proposed reallocation was conditioned on respondent's being reimbursed under the CPFF contracts for the amount claimed in this suit, $2,286,819.95.

Shortly after the tentative approval of the proposed reallocation for renegotiation purposes, respondent, on September 9, 1943, restored to the deferred account, which it had already fully amortized against the fixed-price contracts, a proportion of the experimental, development and tooling expenses which it considered applicable to the CPFF contracts in accordance with the new plan of amortization (R. 84). The sum so restored amounted to $2,286,819.95, the unrestored difference of $1,087,645.05 remaining applicable to the fixed-price contracts (R. 84-85).

Claiming that it was entitled to reimbursement under the CPFF contracts for the $2,286,819.95 in experimental, development and tooling expenses [4] allocated by it on its books to CPFF production, respondent submitted two sets of vouchers to the Air Corps for payment of that sum (R. 85). The first set of vouchers, allocated to deliveries under the CPFF contracts from 1942 to August 1943, and submitted in September, 1943, amounted to $1,299,856.02 (referred to as the 1¼ million dollar claim) (R. 52, 85). The second set of vouchers, allocated

---

[4] Respondent was reimbursed by the United States under the CPFF contracts for production tooling costs incurred after performance of the CPFF contracts had begun. Respondent's Chief Accountant testified that "tooling which was produced during the life of the CPFF contracts and which was built in connection with CPFF contracts was paid for under the CPFF contract" (Transcript, p. 268). The production tooling costs claimed here as being reimbursable under the CPFF contracts are the costs incurred in 1939 and 1940 in connection with the mass production of P-39's under the fixed-price contracts and before any of the CPFF contracts had been awarded. See *supra*, p. 5; (R. 99).

to deliveries under the CPFF contracts after August 1943, and submitted in October 1943, amounted to $986,963.93 (referred to as the $980,000 claim) (R. 85).

The Assistant Resident Auditor for the Air Corps recommended that the vouchers for the 1¼ million dollar claim be rejected because: (1) all of the deferred costs have been charged off to the fixed-price contracts "in the period prior to the inception of [the] CPFF contracts", and (2) the deferred costs were losses suffered by respondent in performing the fixed-price experimental contracts in 1936-1938 and there was no provision in the CPFF contracts for reimbursement of such losses (R. 85). This recommendation was rejected by the Resident Auditor for the Air Corps, who certified the vouchers to the Contracting Officer by whom they were approved for reimbursement under the CPFF contracts (R. 85). The 1¼ million dollar claim was accordingly paid to respondent by the United States, but later recouped after objection by the Comptroller General (R. 85, 87).

The same Assistant Resident Auditor recommended rejection of the October, 1943 vouchers for the $980,000 claim for the same reasons he had urged against the earlier claim (R. 86). By this time, the former Resident Auditor and the former Contracting Officer had been replaced (R. 86). Their successors accepted the Assistant Resident Auditor's recommendation and declined to approve the vouchers for the $980,000 claim (R. 86, 88).

On March 1, 1945, the new Contracting Officer

issued findings of fact on respondent's two claims, pointing out that the total of both claims, "the $2,286,819.95 which Bell had charged on its books against CPFF contracts did not, in fact, represent costs of performing such CPFF contracts," that "the costs in question were in fact recovered by [respondent] through the fixed-price contracts" and that "reimbursement for such costs under the CPFF contracts would result in Bell's receiving double payment from the Government" (R. 88-89). The finding concluded that respondent was not entitled to reimbursement under its CPFF contracts "for any portion of the said sum of $2,286,819.95" (R. 89).

On respondent's appeal under Article 16 of the CPFF contracts (the general Disputes article) from that portion of the Contracting Officer's findings which denied the $980,000 claim, the War Department Board of Contract Appeals affirmed (R. 89-91). Recognizing that reimbursability of the claimed costs depended on examination of "all of the circumstances and facts involved" the Board stated:

> * * * The subject costs—both engineering and development, and production tooling costs —were incurred a considerable time before any of the CPFF contracts were entered into. The production tooling costs were incurred for the express and admitted purpose of performing certain fixed-price contracts then on hand or in process of negotiation. They were not incurred in anticipation of the CPFF contracts

and would have necessarily been incurred regardless of whether any further contracts for the P-39 type of airplane were received or not. The engineering and development costs were incurred during the period 1938 to 1940 and the costs were capitalized because it was felt that the development in connection with which they were incurred had a probable value in connection with expected future sales. In 1940 [respondent] entered upon a course of conduct by which these costs were charged against certain fixed-price contracts. The procedure of charging these costs against fixed-price contracts was continued during 1941 and 1942 in accordance with the mentioned plan to the effect that at the end of 1942 all of the costs in question had been absorbed. During this period some of the subject CPFF contracts were entered into and all of them were negotiated prior to August of 1943 at which time [respondent] changed its plan of amortization to the one now contended for. It is clear from the record that no portion of these costs was included in the estimates under the CPFF contracts and no specific consideration was given to the question of reimbursement in the negotiation of the subject contracts. It also may be reasonably concluded that [respondent] had no intention, at the time the contracts were entered into, of seeking reimbursement for such costs since its accounting method did not contemplate reimbursement.

* * * * *

> Under these circumstances it is difficult to understand how it can now be reasonably contended that an item of cost is reimbursable under the terms of the subject contracts, when, at the time the contracts were negotiated, [respondent] did not intend that the item should be reimbursable and was in fact charging the costs in question against other contracts in accordance with a previously adopted plan. The contracting officer in effect has found that the costs in question were in fact recovered by [respondent] through the fixed-price contracts. Although [respondent] states that these costs were not specifically set out as such in the quotations on the fixed-price contracts, it produced no evidence that these costs were not in fact recovered under the fixed-price contracts. Under the circumstances here present, the Board is of the opinion that the costs are not reimbursable under the subject contracts.

Respondent took no appeal from the Contracting Officer's ruling on the 1¼ million dollar claim, which had theretofore been paid but recouped (R. 89).[5]

[5] Respondent objects to our statement that it "took no appeal" from the ruling on the 1¼ million dollar claim on two grounds: (1) the Court of Claims found that the Contracting Officer "did not act upon" that claim, and (2) the Board of Contract Appeals limited its decision to the $980,000 claim (Brief in opposition, p. 5). The short answer to the first ground is that the court made no such finding. Instead it viewed the Contracting Officer's action on the 1¼ million dollar claim as being "without any effect" (R. 115), a view with which we disagree (see *infra*, pp. 35-41), but which in any event assumes that action *was* taken by the officer as to the 1¼ million dollar claim. Nor is it possible for us to see how the second ground advanced by respondent in any way justifies

Respondent then brought the instant suit in the Court of Claims, demanding payment of the 1¼ million dollar claim and of the $980,000 claim. The court concluded that respondent was entitled to recover the full amount of both claims and awarded judgment for $2,286,819.95 (R. 101, 135). Chief Judge Jones and Judge Madden dissented (R. 132, 133). Judge Jones agreed that respondent was entitled to recover on the 1¼ million dollar claim, but stated that he would disallow the $980,000 claim (R. 132). Judge Madden pointed out that it was "beyond question" that the parties intended "that the costs here sued for were not to be reimbursable" under the CPFF contracts, and that, accordingly, respondent's "recovery is a complete and unexpected windfall of $2,286,819.95." (R. 134). He was therefore of the opinion that recovery should have been denied on both claims (R. 135).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the issue of cost reimbursability was one of law rather than of fact.

2. In failing to hold that the provisions of Article 16 of the CPFF contracts made the determination of the Board of Contract Appeals final and conclusive as to the $980,000 claim.

3. In holding that it had authority to review the determination of the Board of Contract Appeals as

---

its failure to appeal that ruling. It was precisely that failure to appeal which forced the Board to limit its decision to the $980,000 claim.

to the $980,000 claim, to set it aside, and to substitute its own judgment for that of the Board.

4. In holding that Article 3(b) of the contracts, which authorized the contracting officer to pass upon the reimbursability of claimed costs, made the first contracting officer's approval of the 1¼ million dollar claim final and conclusive against the Government.

5. In holding that an Article 3(b) determination by a contracting officer against the contractor is not final and conclusive as to the contractor but that such a determination in his favor and against the Government is final and conclusive as to the Government.

6. In holding that the ruling of the second contracting officer as to the 1¼ million dollar claim was without any effect on respondent.

7. In holding that respondent's failure to appeal that ruling did not bar suit on the 1¼ million dollar claim.

8. In holding, on the merits of the controversy, that the deferred charges in question constituted allowable items of cost and that reimbursement of such costs was required under the CPFF contracts.

9. In entering judgment for respondent for $2,286,819.95.

SUMMARY OF ARGUMENT

The "finality" provision of the disputes clause of the standard CPFF government contracts here involved makes the decision of the head of the department final and conclusive as to all factual disputes arising under the contracts. Obviously, a

main purpose of the "finality" provision is to avoid expensive, time-consuming litigation.

This purpose has been frustrated in the past by the Court of Claims' refusal to apply the plain requirements of the "disputes" clause. It is that same refusal which accounts for the basic error of the court in the instant case.

I

In endeavoring to escape the impact of the "finality clause," at least as to the $980,000 claim, the court below labelled the disputed issue as one of law. The matter in dispute was whether the deferred experimental, development and tooling costs were in fact incurred as a necessary incident to the performance of the CPFF contracts. The answer to this question depended on such issues as when the charges were incurred, whether they had to be incurred to complete the earlier fixed-price contracts, whether they had already been amortized against fixed-price plane production, and whether the estimates of costs for the CPFF contracts included these charges.

That these questions were factual is plain both as an original matter and under well-established principles. It is settled that claims involving the ascertainment of cost pose inquiries of fact. Similarly, it has uniformly been held that the issue as to whether a certain charge is a necessary business expenditure is essentially factual. These principles are decisive here and compel the conclusion that the question involved is one of fact.

The only possible question of law before the court below was whether respondent's reallocation of the deferred charges on its books to CPFF production as well as fixed-price production automatically entitled it to reimbursement for the portion of those charges so assigned to CPFF production. The court's ruling that the reallocation compelled reimbursement was erroneous. The ruling ignored the difference between the permissibility and the reimbursability of a claimed cost. Consideration of that distinction shows that reimbursement of a permissible cost is not mandatory but depends on evaluation of the particular factual circumstances involved.

II

Since the issue involved was factual, the denial of the $980,000 claim resulted in a dispute covered by the "finality" clause. The finality and conclusiveness of an administrative determination under the "disputes" articles can be set aside only if it is shown that the determination was founded on fraud. No such showing was even attempted here. The court below therefore committed plain error in setting aside the administrative determination of the Board of Contract Appeals as to the $980,000 claim.

III

The court also erred in refusing to hold that respondent's failure to take the administrative appeal provided by the contracts was fatal to its 1¼ million dollar claim.

While payment on that claim was initially allowed, its recoupment precipitated a dispute. When the second contracting officer later ruled that no portion of the deferred charges, including the 1¼ million dollar claim, was reimbursable, the appeal mechanism of the disputes article was the only means through which the respondent could seek relief. Respondent's failure to invoke the appellate procedure so provided destroyed its right to bring suit on the 1¼ million dollar claim.

The court sought to justify respondent's failure to appeal by contending that the initial approval of the 1¼ million dollar claim by the first contracting officer was conclusive against the Government and that the second contracting officer's ruling on the claim was without effect. That contention has no merit. No language in Article 3(b) of the contracts is susceptible of a construction which would accord finality to approvals of payment made thereunder. Nor was there at the time of initial approval or payment any "dispute" which could have brought the "finality" provisions of Article 16 into operation. Furthermore, "finality" clauses are designed to avoid time-consuming review by the courts. They cannot stand in the way of administrative correction of an administrative error. That was all that was accomplished when the second contracting officer recouped and ruled that the 1¼ million dollar claim was not reimbursable. It was then that a dispute first arose and the "finality" pro-

visions of the disputes article were brought into play.

IV

The foregoing errors of the court below are, we believe, dispositive of the case. We also submit that on the merits of the controversy the determination by the second contracting officer and the Board of Contract Appeals that the deferred charges were not reimbursable was correct and that the court's conclusion to the contrary was erroneous.

Reimbursability depended on the relationship between the claimed charges and the CPFF contracts under which they were claimed. The claimed charges were all incurred and set up on respondent's books before any of the CPFF contracts were awarded. They were all originally charged off exclusively against planes produced under the fixed-price contracts. They were never included in the cost estimates submitted in negotiating for the CPFF contract. At the time of these negotiations respondent never intended that it would be reimbursed under the CPFF contracts for any portion of the already-incurred and deferred charges. These considerations underscore the fact that the deferred charges could not reasonably be viewed as necessary or incidental to the performance of the CPFF contracts. Accordingly, the decision of the court below gave respondent, as Judge Madden observed, "a complete and unexpected windfall of $2,286,819.95" for the two claims

on which it was not entitled to recover anything at all.

ARGUMENT

The "finality" clause in Article 16 of each of the CPFF contracts here involved provides that all disputes concerning questions of fact shall be decided by the government contracting officer, with the right of appeal to the head of the department or his representative "whose written decision * * * shall be final and conclusive upon the parties." (Appendix, infra, p. 55.) The same "finality" provisions are incorporated in Article 15 of the standard form government contract. That Article and others having equivalent provisions have been before this Court and have been upheld more than a dozen times. *United States* v. *Wunderlich*, 342 U.S. 98; *United States* v. *Moorman*, 338 U.S. 457; *United States* v. *Holpuch Co.*, 328 U.S. 234, 236; *United States* v. *Beuttas*, 324 U.S. 768, 770; *United States* v. *Blair*, 321 U.S. 730, 734; *United States* v. *Callahan Walker Constr. Co.*, 317 U.S. 56, 58; *United States* v. *McShain, Inc.*, 308 U.S. 512, 520; *Merrill-Ruckgaber Co.* v. *United States*, 241 U.S. 387, 393; *Plumley* v. *United States*, 226 U.S. 545, 547; *Chicago S.F. & C.R. Co.* v. *Price*, 138 U.S. 185, 195; *Martinsburg & P.R. Co.* v. *March*, 114 U. S. 549; *Sweeney* v. *United States*, 109 U.S. 618, 620; *Kihlberg* v. *United States*, 97 U.S. 398, 402.

The prime error of the court below was its refusal, contrary to the teaching of these decisions, to accord to the finality provisions the meaning and content which the parties to the contracts must be

assumed to have intended. In nullifying the conclusiveness of the administrative determination adverse to respondent as to the $980,000 claim, the court reasoned that the "finality" clauses were limited to disputed questions of *fact*, that the question at issue was one of law, and that the claim was therefore not affected by the clauses but subject to judicial reexamination. Nevertheless, the court ruled that the initial administrative action favorable to respondent on the 1¼ million dollar claim with respect to the same question was conclusive against the United States.

These inconsistent views in no way justify the court's awarding respondent recovery on either of the two claims, because:

(1) The contracting officer's denial of the $980,000 claim resulted in a dispute. Since the matter in dispute clearly concerned a question of fact—whether the deferred charges were in fact incurred as a necessary incident of production under the CPFF contracts—Article 16 made the Board of Contract Appeals' resolution of that dispute in favor of the United States conclusive and immune from judicial review.

(2) The first contracting officer authorized payment of the 1¼ million dollar claim when there was no dispute which brought Article 16 into operation. His authorization was therefore not binding but subject to correction by the second contracting officer, whose rejection of the claim must be deemed the resolution of a dispute which brought the "finality" clause into play.

We also show that even if the question be viewed as one which the Court of Claims was free to consider, its decision was palpably wrong and should be corrected here.

I

The Dispute Concerned a Question of Fact

The court below expressly held that the issue of cost reimbursability was one of law and "not one of fact" and therefore not within the finality clause of the disputes article (R. 121). But, notwithstanding this express holding in one portion of its opinion (R. 121), the court below stated elsewhere in the same opinion that the contractor's dissatisfaction with a contracting officer's determination of this issue "would result in a dispute to be resolved by the means provided in the Disputes article of the contract" (R. 111). Since that article, as the court recognized, could be brought into operation only where a question of fact was involved, it is apparent that the court's statement that the contractor had access to the appeal procedure provided by that article necessarily assumed that the issue involved was factual rather than legal.

We submit that this assumption, rather than the court's inconsistent holding to the contrary, was correct. Although the difference between questions of fact and law is not easy to define or apply, our task here is lightened by analysis of what the instant dispute did and did not involve. The conclusion compelled by that analysis is that the only disputed questions were factual. This conclusion is

strongly supported by the uniform holdings of this Court and other courts and by the rulings of the Board of Contract Appeals with respect to claims for reimbursement under similar CPFF contracts.

A. THE NATURE OF THE QUESTION IN DISPUTE SHOWS THAT IT IS FACTUAL

It is conceded that the CPFF contracts do not bar reimbursement of experimental, development and production tooling expenses. That "costs of this type may properly be allowed as reimbursable items" was fully recognized in the decision of the Board of Contract Appeals in this case (R. 90). There was therefore never involved in the dispute, any question as to the scope or interpretation of the contractual provisions authorizing reimbursement Art. 3(b), Appendix, *infra*, p. 51), or of the regulations (T.D. 5000, 26 C.F.R. 26.9(a), Appendix, infra, p. 52), which the contract incorporated by reference.[6] But whether those provisions authorized reimbursement of the particular claimed costs depended on whether the costs were "incident to and necessary for the performance" of the CPFF contracts in question (T.D. 5000, 26 C.F.R. 26.9(a), Appendix, *infra*, p. 52).

---

[6] The Treasury Department Regulations contained in T.D. 5000 were promulgated pursuant to the Vinson-Trammel Act of March 27, 1934, as amended by the Acts of June 25, 1936, April 3, 1939, and June 28, 1940 (48 Stat. 505, 49 Stat. 1926, 53 Stat. 560, 54 Stat. 677; 50 U.S.C. App. 1153). These statutes limited profits on sales to the Government of Army and Navy vessels and aircraft. The regulations contained detailed provisions for determining reimbursability of costs incurred by contractors making such sales (Appendix, *infra*, pp. 52-54).

Accordingly, the allowability of the experimental, development and production tooling costs depended on whether as a matter of fact they were incurred as a necessary incident to performance of the CPFF contracts under which they were claimed. That was what was in dispute and nothing more. To answer that question it was necessary to inquire into "all of the circumstances and facts involved" (R. 90): When were the costs incurred? Were they incurred before or during performance of the CPFF contracts under which they were claimed to be necessarily incident? Was the purpose for which the costs were incurred the fulfillment of earlier fixed-price contracts with the Air Corps and Great Britain? Or were they incurred in anticipation of the later award of the CPFF contracts? Would these costs have been incurred by respondent for the purpose of fulfilling the fixed-price contracts even if no CPFF contracts had ever been granted? How were the costs treated on respondent's books? Were they charged to the costs of airplanes delivered under the fixed-price contracts even after some of the CPFF contracts had been negotiated? Did the estimates of cost for the CPFF contracts include these expenses?

There can be no doubt that inquiries of this sort, all of which had to be answered to determine whether the costs were incurred as a proper incident to the CPFF contracts, pose questions of fact and not of law. In resolving these questions the Board of Contract Appeals found that all of the claimed costs were incurred a considerable time

before any of the CPFF contracts were entered into; that they were incurred for the express purpose of performing certain fixed-price contracts rather than any of CPFF contracts; that it was necessary for respondent to incur these costs to produce the planes under its fixed-price contracts; that respondent would therefore have incurred the costs even if no CPFF contracts had been awarded; that all of the costs had been charged by respondent against its fixed-price contract deliveries even after the CPFF contracts had been negotiated; that, at the time of those negotiations, it was not intended or contemplated that the costs would be reimbursed under the CPFF contracts; and that no portion of these costs was included in the estimated cost of producing planes under the CPFF contracts (R. 90-91). Respondent does not dispute these findings. (R. 125).

These factual considerations show that the costs were not incurred as a necessary incident of CPFF contract performance and "did not, in fact, represent costs of performing such CPFF contracts" (R. 89). At the same time these considerations establish the essentially factual nature of the question in dispute.

B. CONSISTENT HOLDINGS BY THE COURTS AND ADMINISTRATIVE AGENCIES CONFIRM THE VIEW THAT THE QUESTION IS FACTUAL

The question as to whether costs were necessarily incurred for the production of the CPFF contracts is simply one aspect of ascertaining the cost of performance under the contract. This Court has held

that claims involving "merely the ascertainment of the cost" are "inquiries of fact" and has accordingly reversed the judgments of the court below in other cases in which that court has attempted to escape the impact of the "finality" clause by labelling purely factual questions as issues of law. *United States* v. *Callahan Walker Co.*, 317 U.S. 56, 61; see also *United States* v. *Wunderlich*, 342 U.S. 98. There is no valid basis for distinguishing the issue in those cases from the cost ascertainment issue here.

An additional persuasive analogy is furnished by the uniform decisions dealing with the question as to whether an expenditure is a necessary business expense and therefore deductible for income tax purposes under Section 23(a)(1)(A) of the Internal Revenue Code. That question normally presents "pure questions of fact". *Commissioner* v. *Heininger*, 320 U.S. 467, 475; *McDonald* v. *Commissioner*, 323 U.S. 57, 64-65; *Peerless Stages* v. *Commissioner*, 125 F. 2d 869 (C.A. 9); *Missouri-Kansas Pipe Line Co.* v. *Commissioner*, 148 F. 2d 460 (C.A. 3); *Chester Distributing Co.* v. *Commissioner*, 184 F. 2d 514 (C.A. 3); *City Ice Delivery Co.* v. *United States*, 176 F. 2d 347 (C.A. 4). The reason for these consistent holdings is obvious. The question normally turns on whether the claimed expense is reasonably and proximately related to the business. *Trust of Bingham* v. *Comm'r*, 325 U.S. 365, 370. Questions of reasonableness and proximity are traditionally regarded as questions of fact. *McDonald* v. *Commissioner*,

323 U.S. 57, 64-65; see *Commissioner* v. *Swedish American Investment* Co., 323 U.S. 119, 124-125.

That reasoning is fully applicable here. The decision that certain costs were not incurred as a necessary incident to the business of performing the CPFF contracts is a decision that the claimed costs did not bear the necessary proximate relation to those contracts. It is a decision, in other words, resolving a factual dispute. The factual nature of similar disputes arising under CPFF contracts has been regularly recognized by the Board of Contract Appeals. *Northrop Aircraft, Inc.*, 3 CCH Contract Cases Fed. 1273, 1274 (appeal taken by CPFF contractor from contracting officer's denial of claimed cost held to be an appeal taken "in accordance with the provisions of the 'Disputes' article (Art. 16) of the contract, which provides for appeal on disputed questions of fact"); *United Air Lines, Inc.*, 3 CCH Contract Cases Fed. 1497, 1500 (reimbursability depends on whether costs "were incident to and necessary for the performance of the contract"); *Douglas Aircraft Company, Inc.*, 3 CCH Contract Cases Fed. 1570, 1571 (after "consideration of all facts and circumstances" the Board denied reimbursability for certain expenses which "may have been of benefit to the Government" but were not "necessary for or incidental to the performance" of the CPFF contracts); *Chrysler Corporation*, 1 CCH Contract Cases Fed. 162 (Board denied reimbursement of claim as not being necessary incident of performance under CPFF contract which stated that disagreements as to re-

imbursability shall be deemed disputes concerning questions of fact within the meaning of Article 16).

The only question of law possibly present in this case is whether the terms of the contract compelled reallocation of the deferred charges to both CPFF contract production and fixed-price production whenever respondent so desired and therefore compelled reimbursability of the portion allocated to the former production. The court below was of the view that the language of T.D. 5000, incorporated into Article 3(b), was mandatory and demanded this reallocation. It ruled that if the costs were allowable there existed the duty of "approving them for reimbursement." (R. 111). It evidently considered that if the costs "fall within the category" (R. 125) which T.D. 5000 makes allowable, they must be allowed. See, generally, R. 124-128.

That this ruling was erroneous can readily be shown. The language of T.D. 5000 makes it clear that an admittedly allowable or permissible cost is not necessarily reimbursable. A cost is permissible when it is of a type which is recognized as generally coming within the category of costs listed by T.D. 5000. If it meets that test the cost *may* be allocated to CPFF production. Whether it should be so allocated, however, depends, as T.D. 5000 provides, on a "complete showing of all pertinent facts." T.D. 5000, 26 C.F.R. 26.9(d), Appendix, *infra*, p. 54. See *Determination of Cost in Military Procurement Cost-Plus-A-Fixed-Fee Contracts*, 65 Harv. L. Rev. 1035, 1039. The Board of Contract Ap-

peals accordingly declared in this case that although "it is true that costs of this type may properly be allowed as reimbursable items under T.D. 5000, it does not follow that such costs must be reimbursed under T.D. 5000 in all cases and under all circumstances. In order to determine whether such items of cost should be reimbursed it is necessary to examine all of the circumstances and facts involved" (R. 90). And, as we have shown at pages 25-27, *supra*, all of the facts involved here show that reimbursement should not be allowed.

It is apparent from the foregoing that the only possible question of law before the court below was incorrectly decided by it, and that a correct disposition of that question confirms our view that determinations as to reimbursability under CPFF contracts of the costs involved here rest essentially on evaluation of the particular factual circumstances involved.

II

The Board of Contract Appeals' Determination of the $980,000 Claim Is Therefore Final and Binding

Since the question was factual, the contracting officer's denial of the $980,000 claim resulted in a dispute covered by the "finality" clause of Article 16 of each of the CPFF contracts.[7] The meaning and effect of that Article is no longer open to doubt. This Court has recently held that the provision for final and conclusive departmental determination

[7] Respondent's brief below admits that its appeal from the denial of this claim "was taken under Article 16 of the Contracts, the 'disputes' clause" (Plaintiff's Brief, No. 47745, Court of Claims, p. 151).

of factual disputes must be given full effect unless the determination "was founded on fraud, alleged and proved." *United States* v. *Wunderlich*, 342 U.S. 98, 100. The Court there emphasized that the only "exception to the conclusiveness of such administrative decision" is fraud on the part of the government arbiter and that "absent fraudulent conduct" his decision "must stand under the plain meaning" of the finality clause of the contract. 342 U.S. at 99, 100. And, to make absolutely clear the scope of the exception to conclusiveness the Court defined fraudulent conduct to "mean conscious wrongdoing, an intention to cheat or be dishonest" (342 U.S. at 100).

Respondent's petition in the court below makes no claim that the denial of the $980,000 claim by the contracting officer or the Board of Contract Appeals was motivated by fraud or an intention to cheat or be dishonest (R. 1-16). To the contrary, respondent made it clear in the court below that it did "not mean to impugn the actual honesty and good faith of any of [the government's] agents. It [*i.e.* the respondent] is prepared to concede that everyone tried to do his duty, honestly and in good faith" (Plaintiff's Brief, No. 47745, Court of Claims, p. 148). In view of this concession by respondent the court below did not and could not find any fraud on the part of the government arbiters.[8]

[8] The majority of the court below did attempt to avoid the impact of the "finality" clause by treating the question as one of law as to which the "disputes" article was inapplicable (R. 121). However, the reasons we have already set out demonstrate that the question was factual in nature. (See *supra*, pp. 25-31.)

There being no fraud, the *Wunderlich* decision requires that the departmental determination at least as to the $980,000 claim "must stand as conclusive." *United States* v. *Wunderlich*, 342 U.S. 98, 101. In refusing to consider itself bound by that determination we submit that the court below plainly erred.

III

The Second Contracting Officer's Unappealed Determination of the 1¼ Million Dollar Claim Is Likewise Final and Binding

In Points I and II we have shown that the issue involved was factual and that the Court of Claims therefore erred in refusing to consider itself bound by the Board of Contract Appeals' denial of the $980,000 claim. We also believe that the court erred in refusing to accord finality to the second contracting officer's unappealed ruling as to the validity of the 1¼ million dollar claim.

The issue involved as to this claim was identical in all respects to that involved in the $980,000 claim, *i.e.*, whether the claimed costs were incurred as a necessary incident to the performance of the CPFF contracts. The issue was, therefore, one of fact as to both claims.[9] Consequently, we agree that an administrative determination of that issue of fact,

[9] Respondent brushes aside the inconsistencies in its arguments, adopted by the Court of Claims (*supra*, p. 24), by accusing the Government of urging that the issue before the first contracting officer was one of law and that before the second was one of fact (Brief in Opposition, pp. 16-17). We have never advanced any such inconsistent position. On the contrary, in this Court as well as in the court below (R. 117) our basic position has always been that the issue before both officers and before the Board of Contract Appeals was purely factual.

if made under the disputes provisions of the contracts, would be entitled to finality and would be unreviewable by the courts. This does not mean, however, that the allowance of the 1¼ million dollar claim by the first contracting officer is conclusive here: (1) that allowance was not a resolution of a "dispute" within Article 16; (2) nothing in Article 3(b) purported to give finality to such an allowance; and (3) in any event, "finality" provisions, while precluding judicial review, do not prevent administrative correction of administrative errors. It was permissible, therefore, for the second contracting officer to rectify the initial approval through recoupment and to disallow the 1¼ million dollar claim. That action resulted in a dispute within the meaning of Article 16 and respondent's failure to appeal made the disallowance final and conclusive.[10]

---

[10] As early as June 1944, respondent was put on notice, through copies of letters furnished by the Resident Auditor for the Army Air Corps, that it was intended to recoup the moneys paid respondent on the 1¼ million dollar claim by deducting that amount from payments due respondent on other vouchers (R. 87). The Resident Auditor's action in recommending the deduction on the vouchers was of course subject to review by the contracting officer and to whatever action "he saw fit". (Transcript, pp. 403-404, 426). And the record shows that in reviewing the recommended deductions the contracting officer took specific action in September, 1944, to correct the erroneous allowance of the 1¼ million dollar claim by "approv[ing]" these vouchers "for recoupment." (Transcript, p. 440). After taking this action, the contracting officer transmitted to the Finance Officer for settlement "the vouchers on which deductions were made by the Resident Auditor" (R. 87; Transcript, p. 440).

A. THE FIRST CONTRACTING OFFICER'S INITIAL APPROVAL OF THE 1¼ MILLION DOLLAR CLAIM WAS NOT CONCLUSIVE

1. *The express terms of Article 16 show that the first Contracting Officer's approval was not a decision under Article 16.* Article 16, which is entitled "Disputes", declares that "all [factual] *disputes*", not disposed of by mutual agreement, "shall be decided by the Contracting Officer", from whose decision the departmental determination on appeal shall be final. (Emphasis supplied). Thus, the basic condition for bringing Article 16 into play is the existence of a dispute. A dispute exists only where something asserted on one side is denied by the other. *In re Robinette*, 211 Minn. 223, 300 N.W. 798. There can be a dispute only where there is controversy, disagreement, opposing contentions or argument to persuade the other side to change its position. *Miners' General Group* v. *Hix*, 123 W. Va. 637, 643-644, 17 S.E. 2d 810, 814; *Block Coal & Coke Co.* v. *United Mine Workers*, 177 Tenn. 247, 148 S.W. 2d 364. Where a claim is filed and rejected it is obvious that a disagreement or dispute has resulted. *Leyerly* v. *United States*, 162 F. 2d 79 (C.A. 10); *Shaull* v. *United States*, 161 F. 2d 891 (C.A. D.C.); *Thrasher* v. *United States*, 132 F. 2d 747 (C.A. 5); *Johnson* v. *United States*, 102 F. 2d 729 (C.A. 10). It is equally apparent that where a claim is filed and acquiesced in by the other side so that payment of the claim is immediately forthcoming no dispute can be said to exist.

Nothing more than that happened here with respect to payment of the 1¼ million dollar claim.

While there was an adverse recommendation by the Assistant Resident Auditor, his recommendation was overruled by his superior, the Resident Auditor, who certified the vouchers to the Contracting Officer, who, in turn, approved them for payment without voicing any objection. There was never any controversy or dispute, therefore, between the respondent and the United States with respect to the initial allowance of that claim.[11]

The foregoing reasoning has been consistently applied to prevent any finality from attaching under Article 16 to an officer's approval for payment in the absence of a dispute. In passing on this question in a similar CPFF contract case, the Office of Contract Settlement Appeal Board recently observed:

> It remains to consider whether the disputes article renders approval of the propriety of the payments by the contracting officer final and conclusive. In my opinion, it has no such effect. In order to bring the disputes article into play, a dispute must exist. Very probably if the contracting officer had disallowed the [claims] * * * and appellant had succeeded in getting him to pass them there would have been a determination binding and conclusive on the parties under the disputes article. * * * In the absence of a dispute, however, the disputes article is without force or effect. [*Her-*

[11] As a matter of fact, there is no evidence that the first Contracting Officer was even aware of the divergent views of the Resident Auditor and the Assistant Resident Auditor.

cules Powder Co. v. *Army*, 4 OCSAB Cases 94, 99-100 (No. 326, Jan. 26, 1950).]

The mere approval of a payment of a claim under a CPFF contract cannot therefore be deemed a conclusive and binding determination. *Hercules Powder Co.* v. *Army, supra; Northwest Airlines, Inc.* v. *Army*, 4 OCSAB Cases 20, 23-24 (No. 282, July 15, 1949); *Hudson Motor Co.* v. *Navy*, 2 OCSAB Cases 39 (No. 134, Aug. 7, 1947); see also *Hercules Powder Co. v. Army*, 4 OCSAB 218, 221, 222 (No. 333, June 14, 1950).

Apart from the "dispute" requirement, other language in Article 16 shows that the contracting officer's initial approval of the claim was not tantamount to a decision under that Article. Three of the four CPFF contracts require the Contracting Officer to "reduce his decision [of any dispute] to writing" and "to mail a copy thereof" to the contractor.[12] Since the Contracting Officer, in approving the vouchers submitted on the 1¼ million dollar claim, did not decide any dispute, there was nothing for him to reduce to writing or to mail to

[12] These requirements appear in Article 16 of Contracts numbered W. 535 ac-20910 (R. 19-20), W. 535 ac-29318 (R. 28) and W. 535 ac-40071 (R. 33). The text of Article 16 of each of these contracts is set forth as exhibits to the petition filed below (R. 19-20, 28, 33). Contrary to the finding of the court below (R. 80, 81), the short-form version of Article 16, which did not require the Contracting Officer's decision to be in writing but which did require the existence of a dispute, appears only in Contract No. W. 535 ac-156 (R. 25). And, even the short-form version, though not expressly requiring a written decision, must, in order to make effective the contractor's right of appeal, be construed to require that the contractor be served with notice of the contracting officer's decisions. (R. 25.)

respondent. If any dispute had been decided at that time, it is fair to assume that these requirements of Article 16 would have been observed.

2. *Nothing in Article 3(b) of the contracts makes the first Contracting Officer's initial approval final and conclusive.* Article 3(b) states that "allowable items of cost will be determined by the contracting officer" (R. 18, 23, 26, 30). All that this language does is to authorize the Contracting Officer, rather than anyone else,[13] to determine the permissibility of claimed costs under the CPFF contracts. The Court of Claims nevertheless read this language so as to make "conclusive and binding" against the Government any determination under Article 3(b) (R. 111). But there is not a single syllable in Article 3(b) referring to finality. Nor does it have any language from which a finality provision can be implied. The provisions of Article 3(b) "fall far short of the 'final and binding' language" necessary to accord finality to the contracting officer's determination of allowability of a claimed cost. *Northwest Airlines, Inc.* v. *Army*, 4 OCSAB Cases 20, 24 (No. 282, July 15, 1949). Indeed, the court below recognized that no finality attached to an Article 3(b) determination with which the contractor was not fully satisfied. The court observed that the contractor's objection to such a determination "would result in a dispute to be resolved by the means provided in the Disputes

[13] The parties bargained for a determination by the contracting officer (see second paragraph of next footnote, *infra*, p. 42), but not that his decision, once made, should be final and free from revision by himself or his successor.

article of the contract" (R. 111). Certainly, if an Article 3(b) determination can be upset by the contractor's mere objection, by no process of proper reasoning can it be held final and conclusive against the Government.

In holding that an Article 3 (b) determination was binding and conclusive, the court below was apparently influenced by respondent's reliance in that court on *United States* v. *Moorman*, 338 U.S. 457. This Court there held that the contracting officer's determination under Par. 2-16(a) of the specifications was final and binding, whether the question was one of fact or law. But Par. 2-16(a), unlike the Article 3(b) provisions here, stated "in language as plain as draftsmen could use that findings of the Secretary of War in disputes of the type here involved shall be 'final and binding.'" *United States* v. *Moorman*, 338 U.S. 457, 463. For the same reason, *United States* v. *Mason & Hanger Co.*, 260 U.S. 323, 325, is not in point—the Article 4 in the contract in that case, unlike Article 3(b) here, expressly made the cost determination "final and binding." The holding in this case that Article 3(b), despite the absence of any similar language of finality, rendered conclusive against the Government the first contracting officer's initial authorization of payment is therefore in complete disregard of the plain provisions of the contract.

3. *"Finality" clauses are intended to prevent judicial review of administrative action rather than the administrative agency's correction of its own error.* There is still another reason precluding

any holding that the first contracting officer's initial approval of the 1¼ million dollar claim was conclusive against the Government and not subject to correction. Even if the language of either Article 16 or Article 3(b) could possibly be interpreted so as to make his approval final, it is our position that the finality attaching to such a determination prohibits judicial review but not administrative correction of an administrative error.

As early as 1878 the Court observed that the purpose of the "disputes clause" was to avoid subjecting the administrative determination "to the revisory *power of the courts.*" *Kihlberg* v. *United States*, 97 U.S. 398, 401 (italics supplied). By agreeing to such a clause the parties agree to "deprive [themselves] of a right to have their controversies *decided in court.*" *United States* v. *Moorman*, 338 U.S. 457, 462 (italics supplied). The parties, in other words, recognizing that the technical disputes bound to arise under the contract are best and more speedily resolved by administrative determination, agree to such a determination of these disputes and agree to immunize the determinations against expensive, time-consuming court litigation.

With this purpose in mind, it is obvious that the "finality" language may be invoked only for the purpose of preventing judicial reappraisal of an administrative determination. It cannot be resorted to in order to forestall administrative correction of an administrative error. *United States* v. *Bentley*, 107 F. 2d 382 (C.A. 2); *Morgan* v. *Hines*, 113 F. 2d 849, 850 (C.A.D.C.); *United States* v.

Gudewicz, 45 F. Supp. 787 (E.D.N.Y.). In the *Bentley* case, the court stressed the fact that "finality" clauses are "not designed to prevent review of their own decisions by the officials themselves, but to limit any review of the courts." 107 F. 2d 382, 383. The court accordingly rejected the argument that the Secretary of War could not correct an earlier decision made "final and conclusive" by the statute under which it was handed down.

For the same reasons the Department of the Army, in this case, acting through the second contracting officer, was fully empowered to correct the first contracting officer's authorization even if it be assumed, contrary to the contentions we have advanced, that "finality" attached to the authorization either under Article 16 or 3(b). Certainly, if the first contracting officer had denied the claim improperly or had given respondent too little, the second contracting officer would not have been compelled to perpetuate the injustice on the theory that the "finality" language forbade him to correct the earlier mistake. Nor should he be compelled to perpetuate the injustice where, as here, the first contracting officer awarded too much.[14]

---

[14] That the Government may, as it did here, recoup moneys paid out by a public officer under mistake of either fact or law is well settled. *United States* v. *Wurts*, 303 U.S. 414; *Wisconsin Central R.R.* v. *United States*, 164 U.S. 190, 212; *United States* v. *Burchard*, 125 U.S. 176; *Heidt* v. *United States*, 56 F. 2d 559 (C.A. 5), certiorari denied, 287 U.S. 601; *United States* v. *Sutton Chemical Co.*, 11 F. 2d 24 (C.A. 4). This proposition is fully applicable even where the administrative action leading to the improper payment is "final and binding." *United States* v. *Bentley*, 107 F. 2d 382 (C.A. 2);

B. SINCE RESPONDENT IGNORED THE AGREED PROCEDURE FOR SETTLEMENT OF DISPUTES, IT HAS NO STANDING TO SUE FOR DAMAGES BASED ON SUCH DISPUTES

There was no dispute between respondent and the Government when the first contracting officer authorized payment of the 1¼ million dollar claim. *Supra*, p. 35. However, approval of vouchers by the second contracting officer providing for recoupment of that payment, which was the equivalent of rejection of the 1¼ million dollar claim, did result in a dispute. Therefore, in his written finding of fact and decision, dated March 1, 1945, the Second Contracting Officer considered this disputed claim as well as the $980,000 claim and decided that respondent was not entitled to reimbursement on either claim (R. 89).

Article 16 of each of the four CPFF contracts provides for decision of disputed factual questions by the contracting officer. His decision, however, is subject to appeal to the head of the department (or his representative) whose decision "shall be final and conclusive." It is now settled that this

---

Morgan v. *Hines*, 113 F. 2d 849 (C.A. D.C.); *United States* v. *Gudewicz*, 45 F. Supp. 787 (E.D. N.Y.).

The "finality" clauses, as we have shown (pp. 29-41), do not bar correction by the administrative agency of its own error. Thus, in the instant case, the Department of the Army, acting through the second contracting officer, could correct the first officer's error. This situation must be distinguished from that where the administrative agency insists that no error has been made by it but the General Accounting Office asserts that the payment was improper. See *Mathis Co.* v. *United States*, 79 F. Supp. 703 (D. N.J.), relied on by respondent below. In that situation the courts will not allow the General Accounting Office to substitute its decision for the determination of the administrative agency because the latter determination is the only one by which both parties had contracted to abide.

appeal "mechanism . . . is exclusive in nature. Solely through its operation may claims be made and adjudicated as to matters arising under the contract." *United States* v. *Holpuch Co.*, 328 U.S. 234, 239-240; *United States* v. *Blair*, 321 U. S. 730, 735; *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61. A contractor who, after accepting and agreeing to Article 16, ignores its provisions "destroys his right to sue for damages in the Court of Claims. That court is then obliged to outlaw his claims, whatever may be their equity. To do otherwise is to rewrite the contract." *United States* v. *Holpuch Co.*, 328 U.S. 234, 240.

Here, respondent complied with the provision of Article 16 as to the $980,000 claim but chose to ignore those same provisions as to the second contracting officer's disallowance of the 1¼ million dollar claim. With respect to the latter claim, therefore, respondent's position is precisely the same as that of the respondents in *United States* v. *Holpuch Co.*, 328 U.S. 234; *United States* v. *Blair*, 321 U.S. 730, and *United States* v. *Callahan Walker Co.*, 317 U.S. 56, all of whom were denied recovery by this Court on the ground that they had failed to take the administrative appeal provided by the "Disputes" article. We submit that the same reasons which impelled this Court to reverse the Court of Claims in the *Holpuch*, *Blair* and *Callahan Walker* cases require reversal as to the 1¼ million dollar claim in the instant case.[15]

---

[15] If respondent had appealed, the grounds of decision taken by the Board as to the $980,000 claim would have required

As in the *Holpuch* and *Blair* cases, so here "the Court of Claims sought to justify respondent's refusal" or "failure to pursue the procedure outlined in" the Disputes Article. See 328 U.S. at 242; 321 U.S. at 736. It sought to avoid the effect of the *Holpuch*, *Blair* and *Callahan Walker* decisions on two grounds. First, the court noted that the first contracting officer had authorized payment so that no dispute then arose which brought the Disputes Article into play (R. 116). With that observation we fully agree. See *supra*, p. 35. But it is beside the point. It overlooks the whole thrust of our argument in the court below and here, *i.e.*, that a dispute which did bring Article 16 into play resulted when the claim was disapproved and that payment was recouped. The court's second reason for refusing to apply *Holpuch* and its related cases was that "there was no occasion for the second Contracting Officer to make any findings or render any decision" as to the 1¼ million dollar claim (R. 116). The short answer to this argument is that it does not accord with the facts. The record shows that the 1¼ million dollar claim had been fully recouped by the Government no later than September, 1944 (R. 87-88). Since this claim was never abandoned by respondent it was still outstanding and therefore necessarily before the second con-

---

the Board also to deny the 1¼ million dollar claim, and respondent would for that reason have been unable to recover. But since respondent's failure to appeal precluded the Board from considering the 1¼ million dollar claim, it follows that decision against respondent on that claim must be rested on the failure to appeal.

tracting officer when he decided, in March, 1945, that both that claim as well as the $980,000 claim were not reimbursable (R. 89).[16] Accordingly, neither of the grounds relied on by the court below justifies its condonation of respondent's failure to exhaust the administrative appeal remedy afforded by Article 16.

IV

In Any Event, the Determination by the Second Contracting Officer and the Board of Contract Appeals That the Deferred Charges Were Not Reimbursable Was Correct and That of the Court Below Erroneous

In our view, the Board of Contract Appeals' determination of non-reimbursability as to the $980,000 claim and the second contracting officer's unappealed disallowance of the 1¼ million dollar claim are conclusive as to the respective claims and hence dispositive of the present case. It is our further belief that with respect to the merits of the controversy the decision below is also erroneous.

The reimbursability of the deferred experimental development and tooling charges depended, as has been shown, on whether they were incurred as a necessary incident to the performance of the CPFF contracts under which they were claimed (See *supra*, p. 25). In deciding that the charges

[16] The court's opinion also refers to the General Accounting Office's lack of power to reverse the first contracting officer's approval of payment (R. 116). But here the administrative agency itself, *i.e.*, the Army department, acting through the second contracting officer, reversed the earlier decision. It is true that the second contracting officer's view coincided with those of the General Accounting Office. That cannot change the fact that it was the Army itself which corrected its earlier error. See footnote 14, *supra*, pp. 41-42.

were reimbursable the court below implicitly held that they were so incurred. That holding, we show below, has nothing to support it.

The experimental and development costs were incurred by respondent in connection with the four experimental contracts it received in 1936-1938 (R. 67). By the end of 1940, all of these costs, aggregating 1½ million dollars, had been deferred and capitalized on respondent's books (R. 69). It is significant that the first CPFF contract was awarded on August 14, 1941 and that respondent had no CPFF contracts as of December, 1940, when all of the deferred experimental and development costs already had been set up on its books (R. 76).

The claimed tooling costs were incurred by respondent in producing over 1700 P-39 planes for the United States and Great Britain under fixed-price contracts amounting to approximately 70 million dollars. These costs were incurred in 1939 and 1940, so that by the end of 1940 all of the tooling costs, aggregating almost $1,900,000.00, also had been deferred and capitalized on respondent's books. As already noted, there were no planes under CPFF contract at that time. To the extent that any production tooling costs were incurred by respondent after August 14, 1941 and in connection with the CPFF contracts entered into on and after that date respondent has received reimbursement under the CPFF contracts (R. 99; see footnote 4, *supra*, p. 11). It is important to remember that these CPFF tooling costs are not here involved. In the instant suit respondent claims reimburse-

ment under CPFF contracts for the tooling costs it incurred in 1939 and 1940 in order to fulfill the fixed-price contracts it then had (R. 89).

The fact that the deferred charges were all incurred and set up on respondent's books before any of the CPFF contracts were awarded would by itself establish at least a strong *prima facie* case that the charges were unrelated to the later CPFF production and hence not a necessary incident to performance of the CPFF contracts. Here, however, many other factors confirm that conclusion:

1. Respondent originally charged off the entire amount of the deferred charges to planes produced under the fixed-price contracts (R. 76). This process of charging the deferred costs to fixed-price production alone began in 1940 and was continued by repondent through 1942, until by the end of 1942 those costs had been fully allowed from the fixed price contracts. This process was followed despite the fact that, starting in August, 1941, it received a series of CPFF contracts calling ultimately for the production of over 10,000 P-39's (R. 76). If the deferred charges were considered a necessary incident to CPFF contract production it seems obvious that a portion of those charges would, during 1941 and 1942, have been allocated by respondent to CPFF production.

2. That respondent did not consider the charges as a necessary incident to CPFF production and therefore never intended to be reimbursed for such charges under the CPFF contracts is attested to by still other considerations: (a) Respondent's An-

nual Reports for 1941 and 1942 stated that it was its intention to charge off the entire amount of the deferred charges to airplanes under contract as of December 31, 1940 (R. 76). The only aircraft then under contract were those called for by the fixed-price contracts with the Air Corps and Great Britain (R. 71). (b) Respondent never included any portion of the deferred charges in any of its estimates of cost submitted in negotiating for the CPFF contracts (R. 76, 82, 125). And (c) respondent expressly recognized that this failure to include the charges in the negotiations for the CPFF contracts compelled it to amortize these charges "against the fixed price contracts only" and precluded reimbursement for the charges under the CPFF contracts (R. 82).

The fact that respondent's decision to claim reimbursement for these expenses under its CPFF contracts was the result, at least in part, of pressure from the Bureau of Internal Revenue, with respect to excess profits taxes, does not justify the result reached by the Court of Claims. The Bureau had no power to amend the CPFF contracts or to determine what items should be reimbursable under them. Moreover, it is significant that the tax adjustment increased respondent's net tax liability by approximately $32,000, as compared with the amount of $2,286,819.95 here awarded to respondent below (R. 60, 134). Nor can any justification be found in the renegotiation agreement entered into between respondent and the United States for 1942. That agreement did not compute respond-

ent's excessive profits on the basis of allowing a portion of the deferred charges as costs under the CPFF contracts. Instead, it allowed respondent to charge all of the deferred costs to P-39 production under the fixed-price contracts (R. 93-94). The agreement further provided that if the Army and General Accounting Office finally approved reimbursement under the CPFF contracts of the claimed portion of the deferred charges, an additional refund of $667,000 would be required of respondent (R. 94). That final approval, of course, was not granted and the provision has not yet taken effect, and cannot take effect unless this Court affirms the judgment below.

In these circumstances, as the Board of Contract Appeals observed, "it is difficult to understand how it can now be reasonably contended that an item of cost is reimbursable under the terms of the subject contracts, when, at the time the contracts were negotiated, [respondent] did not intend that the item should be reimbursable and was in fact charging the costs in question against other contracts in accordance with a previously adopted plan." (R. 91). Judge Madden's dissent summarizes these considerations by demonstrating that the Court of Claims allowed respondent to recover "for something [for] which, when it made the contracts under which it claims the payment, it intended that it should be paid nothing at all" (R. 133). The court's decision, as Judge Madden further observed, therefore gave respondent "a complete and unexpected windfall of $2,286,819.95" for two

claims on which it was not entitled to recover anything at all.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

ROBERT L. STERN,
Acting Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
PAUL A. SWEENEY,
MORTON HOLLANDER,
Attorneys.

SEPTEMBER, 1952

APPENDIX

1. Each of the four CPFF contracts contains the following provisions (R. 18, 23-24, 25-26, 29-30):

ARTICLE 3. CONSIDERATION

(a) The Government will pay the Contractor upon satisfactory delivery of all items specified in the contract, subject to reimbursement for cost as outlined in Article 6 hereof, the cost, plus a fixed fee of * * * being * * * percent of the total estimated cost of * * *. This estimated cost and the fixed fee are subject to increases or decreases resulting from authorized changes as provided in Article 5 hereof. Provided, however, that there shall be no adjustment in the amount of the fixed-fee as provided herein, nor shall there be any claim for increased compensation, because of any errors and/or omissions made in computing the original estimated cost of the work or where the estimated cost varies from the actual cost.

(b) For the purpose of determining the amount payable under this contract, allowable items of cost will be determined by the Contracting Officer in accordance with Regulations for determination of the cost of performing a contract as promulgated by the Treasury Department in Section 26.9 of Chapter 1 of Title 26 of Code of Federal Regulations, as contained in T.D. 5000 and approved by the Secretary of War August 2, 1940. It being understood and agreed without limiting the generality of the foregoing, that

(1) All costs which have been incurred by the Contractor in anticipation of this contract

and prior to the signing thereof, and which if incurred after the signing of this contract, would have been considered as allowable items of cost within the meaning of said regulations, shall be considered as allowable items of cost incurred hereunder.

2. The Treasury Department regulations referred to in Article 3 (b) of the contracts *supra*, provide in pertinent part (26 C.F.R. 26.9, 1940 Supp.):

§ 26.9 *Cost of performing a contract or subcontract*—(a) *General rule.*—The cost of performing a particular contract or subcontract shall be the sum of (1) the direct costs, including therein expenditures for materials, direct labor and direct expenses, incurred by the contracting party in performing the contract or subcontract; and (2) the proper proportion of any indirect costs (including therein a reasonable proportion of management expenses) incident to and necessary for the performance of the contract or subcontract.

(b) *Elements of cost.*—No definitions of the elements of cost may be stated which are of invariable application to all contractors and subcontractors. In general, the elements of cost may be defined for purposes of the Act as follows:

(1) Manufacturing cost, which is the sum of factory cost (see paragraph (c) of this section) and other manufacturing cost (see paragraph (d) of this section);

* * * * *

(c) *Factory cost.* Factory cost is the sum of the following:

* * * * *

(5) *Indirect factory expenses.* Items, usually termed "factory overhead," which are not directly chargeable to the factory cost of performing the contract or subcontract but which are properly incident to and necessary for the performance of the contract or subcontract and consist of the following:

* * * * *

(iv) *Fixed charges and obsolescence.* Recurring charges with respect to property used for manufacturing purposes of the contract or subcontract, such as premiums for fire and elevator insurance, property taxes, rentals and allowances for depreciation of such property, including maintenance and depreciation of reasonable standby equipment; and depreciation and obsolescence of special equipment and facilities necessarily acquired primarily for the performance of the contract or subcontract, except special additional equipment and facilities with respect to which the Secretary of the Department concerned has made a certification binding upon the Commissioner of Internal Revenue, pursuant to section 4 of the Act, in the case of such contract or subcontract. * * *

* * * * *

(d) *Other manufacturing cost.* Other manufacturing cost as used in paragraph (b) of this section includes items of manufacturing costs

which are not properly or satisfactorily chargeable to factory costs (see paragraph (*c*) of this section) but which upon a complete showing of all pertinent facts are properly to be included as a cost of performing the contract or subcontract, as for instance, payments of royalties and amortization of the cost of designs purchased and patent rights over their useful life; and "deferred" or "unliquidated" experimental and development charges. For example, in case experimental and development costs have been properly deferred or capitalized and are amortized in accordance with a reasonably consistent plan, a proper portion of the current charge, determined by a ratable allocation which is reasonable in consideration of the pertinent facts, may be treated as a cost of performing the contract or subcontract. In the case of general experimental and development expenses which may be charged off currently, a reasonable portion thereof may be allocated to the cost of performing the contract or subcontract. If a special experimental or development project is carried on in pursuance of a contract, or in anticipation of a contract which is later entered into, and the expense is not treated as a part of general experimental and development expenses or is not otherwise allowed as a cost of performing the contract, there clearly appearing no reasonable prospect of an additional contract for the type of article involved, the entire cost of such project may be allowed as a part of the cost of performing the contract.

* * * * *

3. a. The Disputes Article in the CPFF contract numbered W 535 ac-156 Provides (R. 23, 25):

ARTICLE 16. DISPUTES

> Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the Contractor shall diligently proceed with performance.[17]

b. The Disputes Article in the three other CPFF contracts provides (R. 19-20, 28-29, 33):

ARTICLE 16. DISPUTES

> Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail a copy thereof to the Contractor at his address shown herein. Within 30 days

[17] Our petition for certiorari, relying on the findings of the Court of Claims (R. 80), stated that this short form version of Article 16 appeared in three of the four CPFF contracts. But the record shows that it appeared in only one CPFF contract and that the longer version of Article 16, set out under 3(b) of the Appendix, appeared in the other three contracts. See record references under 3(a) and 3(b) of the Appendix.

from said mailing the Contractor may appeal in writing to the Secretary of War, whose written decision or that of his designated representative or representatives thereon shall be final and conclusive upon the parties hereto. The Secretary of War may, in his discretion, designate an individual, or individuals other than the Contracting Officer, or a board as his authorized representative to determine appeals under this Article. * * * Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance of this contract. Any sum or sums allowed to the Contractor under the provisions of this Article shall be paid by the United States as part of the cost of the articles or work herein contracted for and shall be deemed to be within the contemplation of this contract.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 232049 377

25

Office - Supreme Court, U. S.
FILED
OCT 9 - 1952
CHARLES ELMORE CROPLEY
CLERK

No. 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

THE UNITED STATES, *Petitioner*,

v.

BELL AIRCRAFT CORPORATION, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENT

ANSLEY W. SAWYER,
HOWARD C. WESTWOOD,
W. CROSBY ROPER, JR.,
Attorneys for Respondent.

EDGAR F. CZARRA, JR.,
ALFRED V. J. PRATHER,
VIRGINIA G. WATKIN,
Of Counsel.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Contract and Regulation Provisions Involved	1
Statement	2
Questions Presented	21
Summary of Argument	22
Argument	26
I. The Charges for Experimental and Development and Production Tooling Costs Made to the CPFF Contracts Were Reimbursable Costs Under the Provisions of Those Contracts	26
A. The Experimental and Development and Production Tooling Costs Are Allowable Costs Under T.D. 5000	26
B. The Facts Relied on by Petitioner as a Basis for Denying Reimbursement Have Significance Only in Terms of Respondent's Original Intention or Expectation with Respect to Reimbursement	32
C. Respondent's Original Intention Regarding Reimbursement of Costs Is Irrelevant	38
1. To overrule the lower Court would be to disregard the underlying theory and the specific provisions of the CPFF Contracts	39
2. The overrule the lower Court would be to disregard basic principles of Contract Law	45
II. Whether the Experimental and Development Expenses and Production Tooling Costs Were Allowable Under the Provisions of the CPFF Contracts Presented a Question of Interpretation of the Contracts as to Which the Administrative Determination Under the Fact Disputes Clause Was Not Final and Binding	50
A. This Case Presents a Straightforward Question of Contract Interpretation	50

Page

B. It Is Well Settled that Questions of Contract Interpretation are not Disputes Concerning Questions of Fact Within the Meaning of the Fact Disputes Clause 52

III. The Respondent's Claim for $1,299,856.02 Is Not Barred for Failure to Exhaust Administrative Remedies 56

A. The Lower Court Properly Held That the Second Contracting Officer Never Acted on the First Set of Vouchers Covering Respondent's Claim for $1,299,856.02 57

B. Since Respondent Appealed the Only Decision Made by the Second Contracting Officer, There Is no Merit to the Claim That It Failed to Exhaust Its Administrative Remedies 60

C. Absent Any Authorization in the Contracts, the Second Contracting Officer Had No Power to Review and Reverse the Determinations of His Predecessor 61

Conclusion 71

Appendix A. Pertinent Provisions of T.D. 5000 73

Appendix B. Pertinent Provisions of the CPFF Contracts.. 84

Appendix C. Pertinent Exhibits 89

CITATIONS

Cases:

A. C. Campbell Co., 1 CCH CONTRACT CASES FED. 776 (WD BCA 1943) 69

Albina Marine Iron Works, Inc. v. *United States*, 79 Ct. Cl. 714 (1934) 53, 66

Alcoa Steamship Co. v. *United States*, 338 U. S. 421 (1949).. 63

Barnes Construction Co., 3 CCH CONTRACT CASES FED. 553 (WDBCA 1945) 69

Bell Aircraft Corp., 3 CCH CONTRACT CASES FED. 684 (WD BCA 1945) 65

Bessemer Investment Co. v. *Commissioner*, 31 F. 2d 248 (2d Cir. 1929) 36

Blair v. *United States*, 164 F. 2d 115 (5th Cir. 1947), *cert. denied*, 333 U. S. 880 (1948) 53

Page

Burton Coal Co. v. *United States*, 60 Ct. Cl. 294 (1925), *aff'd. on another issue*, 273 U. S. 337 (1927) 66
Butte, A. & P. Ry. v. *United States*, 290 U. S. 127 (1933) ... 64
Calderon v. *Atlas Steamship Co.*, 170 U. S. 272 (1898) 46
Central Engineering & Contracting Corp., 3 CCH CONTRACT CASES FED. 989 (NDBCA 1945) 53
Central Nebraska Public Power and Irrigation District v. *Tobin Quarries, Inc.*, 157 F. 2d 482 (8th Cir. 1946) 53
Collins and Farwell v. *United States*, 34 Ct. Cl. 294 (1899).. 52
Commissioner v. *Heininger*, 320 U. S. 467 (1943) 55
Commissioner v. *Union Pacific R.R.*, 86 F. 2d 637 (2d Cir. 1936) 36
Conners' Case, 121 Me. 37, 115 Atl. 520 (1921) 64
Continental Aviation & Engineering Corp., 4 CCH CONTRACT CASES FED. ¶60,525 (WDBCA 1948) 65
Cramp Shipbuilding Co. v. *United States*, Ct. Cl. No. 48841, April 8, 1952 53
Cramp & Sons Ship & Engine Building Co. v. *United States*, 72 Ct. Cl. 146 (1931) 65, 70
Davis v. *United States*, 82 Ct. Cl. 334 (1936) 53
Douglas Aircraft Co., Nos. 1346 and 1376 (WDBCA 1940) .. 41
Douglas Aircraft Co. v. *United States*, 95 Ct. Cl. 140 (1941)..32, 36
Doyle v. *Mitchell Bros. Co.*, 247 U. S. 179 (1918) 35
Dunn Construction Co., 4 CCH CONTRACT CASES FED. ¶60,478 (WDBCA 1948) 65
E. I. du Pont de Nemours & Co. v. *Army*, 3 OCSAB 201 (1949) 54
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944) 35
Fred A. M. deGroot, Inc., 1 CCH CONTRACT CASES FED. 148 (WDBCA 1943) 53
Goldschmidt & Bethune Co., 3 CCH CONTRACT CASES FED. 381 (WDBCA 1945) 69
Goltra v. *Weeks*, 271 U. S. 536 (1926) 68
Graham Mfg. Co. v. *United States*, 91 F. Supp. 715 (N.D. Cal. 1950) 68
Greenwood, E. P., 34 B.T.A. 1209 (1936) 35
Hylan v. *Waldo*, 158 App. Div. 654, 143 N.Y. Supp. 901 (1st Dep't 1913) 64
ICC v. *Delaware, L. & W. R.R.*, 220 U. S. 235 (1911) 55
ICC v. *Railway Labor Executives Ass'n*, 315 U. S. 373 (1942) 55
John McShain, Inc. v. *United States*, 97 Ct. Cl. 281 (1942) .. 53
John T. Brady & Co., 1 CCH CONTRACT CASES FED. 772 (WD BCA 1943) 69
Kalinick v. *Collins*, 116 Conn. 1, 163 Atl. 460 (1932) 64
Karno-Smith Co. v. *United States*, 84 Ct. Cl. 110 (1936) 66

Page

Kihlberg v. *United States*, 97 U. S. 398 (1878) 68
King Iron Bridge & Mfg. Co. v. *St. Louis*, 43 Fed. 768 (C.C. E.D. Mo. 1890), *appeal dismissed*, 149 U. S. 769 (1892).... 52
Lewis v. *Chicago S. F. & C. Ry.*, 49 Fed. 708 (C.C.E.D. Mo. 1891) 52
Lindheimer v. *Illinois Bell Telephone Co.*, 292 U. S. 151 (1934) 35
Lyons v. *United States*, 30 Ct. Cl. 352 (1895) 52
McChain Co. v. *United States*, 83 Ct. Cl. 405 (1936) 66
Michelson v. *Industrial Commission*, 375 Ill. 462, 31 N.E. 2d 940 (1941) 64
Montana National Bank v. *Yellowstone County*, 276 U. S. 499 (1928) 61
Moran v. *Prather*, 23 Wall. 492 (U. S. 1874) 46
Morgan v. *Hines*, 113 F. 2d 849 (D.C. Cir. 1940) 65
Mutual Life Ins. Co. v. *Hurni Packing Co.*, 263 U. S. 167 (1923) 63
N. P. Severin Co., 2 CCH Contract Cases Fed. 771 (WDBCA 1944) 69
New York Central R.R. v. *Commissioner*, 79 F. 2d 247 (2d Cir. 1935), *cert. denied*, 296 U. S. 653 (1935) 36
New York Sash & Door Co. v. *National House and Farms Ass'n, Inc.*, 131 N.J.L. 466, 36 A. 2d 891 (1944) 46
Norfolk & Western Ry. v. *United States*, 287 U. S. 134 (1932) 35
Northwest Airlines, Inc. v. *Army*, 4 OCSAB 11 (1949) 54
Northwest Airlines, Inc. v. *Army*, 4 OCSAB 16 (1949) 54
Paretta Contracting Co. v. *United States*, 109 Ct. Cl. 324 (1947), *cert. denied*, 333 U. S. 832 (1948) 70
Peerless Stages, Inc. v. *Commissioner*, 125 F. 2d 869 (9th Cir. 1942) 56
Penn Bridge Co. v. *United States*, 59 Ct. Cl. 892 (1924) 66
People v. *Wemple*, 144 N.Y. 478, 39 N.E. 397 (1895) 64
Pottsville Casting & Machine Shops, Inc. v. *United States*, Ct. Cl. No. 49092 (Dec. 4, 1951) 70
Powers v. *Commissioner*, 312 U. S. 259 (1941) 55
Ross Engineering Co., 3 CCH Contract Cases Fed. 1153 (NDBCA 1945) 53
Rust Engineering Co. v. *United States*, 86 Ct. Cl. 461 (1938) 53
St. Louis Shipbuilding & Steel Co., 4 CCH Contract Cases Fed. ¶ 60,143 (NDBCA 1946) 53
Southern Pacific Co. v. *ICC*, 219 U. S. 433 (1911) 55
Standard Dredging Co. v. *United States*, 71 Ct. Cl. 218 (1930) 65
Stewart & Co. v. *United States*, 71 Ct. Cl. 126 (1930) 66
Sun Shipbuilding & Dry Dock Co. v. *United States*, 76 Ct. Cl. 154 (1932) 65
The Arundel Corp., 4 CCH Contract Cases Fed. ¶ 60,624 (NDBCA 1948) 53

Page

Trust of Bingham v. *Commissioner*, 325 U. S. 365 (1945) 55
Union Metal Mfg. Co., 1 B.T.A. 395 (1925) 35
United States v. *Bentley*, 107 F. 2d 382 (2d Cir. 1939) 63
United States v. *Gleason*, 175 U. S. 588 (1900) 68
United States v. *Great Northern Ry.*, 287 U. S. 144 (1932) .. 66
United States v. *Gudewicz*, 45 F. Supp. 787 (E.D. N.Y. 1942) 63
United States v. *Lundstrom*, 139 F. 2d 792 (9th Cir. 1943) .. 53, 70
United States v. *Mason & Hanger Co.*, 260 U. S. 323 (1922) .. 62
United States v. *Moorman*, 338 U. S. 457 (1950) 54, 55
United States v. *Seatrain Lines, Inc.*, 329 U. S. 424 (1947) .. 64
United States v. *Sutton Chemical Co.*, 11 F. 2d 24 (4th Cir. 1926) 66
Utah Power & Light Co., 14 S.E.C. 764 (1943) 35
Waite v. *Macy*, 246 U. S. 606 (1918) 61
Waterman Steamship Corp., 5 CCH CONTRACT CASES FED. ¶ 61,222 (ASBCA 1951) 54
Wunderlich v. *United States*, 117 Ct. Cl. 92 (1951), *rev'd on other grounds*, 342 U. S. 98 (1951) 53

Statutes:

The Renegotiation Act of 1942, 56 Stat. 245 (1942), as amended, 50 U.S.C. App. § 1191 (1946) 5
Vinson-Trammell Act, 48 Stat. 505 (1934), as amended, 34 U.S.C. § 496 (1946) 5
62 Stat. 21 (1948), 41 U.S.C. §§ 151 *et seq.* (Supp. V 1952) 9
56 Stat. 983 (1942), as amended, 50 U.S.C. App. § 1191(e)(2)(1946) 47
54 Stat. 712 (1940), 50 U.S.C. App. § 1171 (1946)..... 5
54 Stat. 1003 (1940), 34 U.S.C. § 496a (1946) 5
53 Stat. 560 (1939), 10 U.S.C. § 311 (1946) 5

Legislative Materials:

H. R. REP. No. 871, 78th Cong., 1st Sess. (1943)..... 47
H. R. REP. No. 1634, PART I, 77th Cong., 2d Sess. (1942).... 3
Hearings Before the Senate Committee on Naval Affairs Relative to Cost-Plus-Fixed-Fee Contracts, 77th Cong., 1st Sess. (1941) 6
Hearings Before Subcommittee No. 6 of the House Committee on Armed Services on H.R. 1366, 80th Cong., 1st Sess. (1947) 3
Hearings Before a Subcommittee of the Senate Committee on Military Affairs on S. J. Res. 80, 78th Cong., 2d Sess. (1944) 6, 8
Hearings Before a Subcommittee of the House Committee on Appropriations on the Military Establishment Appropriation Bill for 1940, 76th Cong., 1st Sess. (1939)..... 4

Page

Administrative Materals:

ARMY REGS. 35-180 (May 27, 1942) 14
ARMY TM 14-1000, ADMINISTRATIVE AUDIT PROCEDURES FOR COST-PLUS-A-FIXED-FEE SUPPLY CONTRACTS (1944) 14
Memorandum of Secretary of War dated July 4, 1944, 10 CODE FED. REGS. § 803.318d(g) (Supp. 1944) 19, 53
Treasury Decision 5000, 1940-2 CUM. BULL. 397.....7, 27-28
War Department Procurement Regulations, 7 FED. REG. 6098, 8082 (1942) 8

Miscellaneous:

ASF, "Purchasing Policies and Practices, Official History of Purchases Division" 3, 6, 44
Brown, "The Responsibilities, Functions and Duties of a Contracting Officer", 12 Fed. B.J. 236 (1952) 64
Demuth, "Administration of CPFF Contracts" (1944)....14, 64
Dinkelspiel, "Flexible Pricing in Fixed Price Contracts" (1944) 6
Fain and Watt, "War Procurement—A New Pattern in Contracts," 44 Col. L. Rev. 127 (1944) 7, 8
Fesler, "Industrial Mobilization for War: History of the War Production Board and Predecessor Agencies" (1947)..... 4
Graske, "The Law of Government Defense Contracts" (1941) 9
Hatfield, Sanders, Burton, "Accounting Principles and Practice" (1940) 35
Hills, "Statement of Legal Concepts of Accounting," 36 Iowa L. Rev. 198 (1951) 36
Hopkins, "Termination Procedure for Army Air Forces," N.Y.U. Conference on Problems of Termination and Reconversion (1944) 62
Kress, "Contract Pricing—Principal Developments, Study of Experience in Industrial Mobilization in World War II" (1946) 6
Lilly, Hunt, Butters, Gilmore, Lawler, "Problems of Accelerating Aircraft Production During World War II" (1946) 4
Maddren, "Administrative and Judicial Machinery," 10 Law & Contemp. Prob. 659 (1944) 52
Miller, "Pricing of Military Procurements" (1949).....4, 6, 7
Office of the General Counsel, "Navy Contract Law" (1949) 47
Paton, "Advanced Accounting" (1947) 35
Scarff, "Negotiation and Administration of Contracts" (1944) 7, 8
Sittersen, "Aircraft Production Policies Under the National Defense Advisory Commission and Office of Production Management, May 1940 to December 1941" (1946) 4
Sommers, "Cost-Plus-Fixed Fee Contracts" (1944) 3

Page

Swatland, "The Procurement Functions of the AAF, the ATSC and the Contracting Officer" (1944) 7
Welch, "Types of Defense Contracts," 12 Fed. B.J. 233 (1952) 6
Williston, "Contracts" (Rev. Ed. 1938) 46
Wiltse, "Aircraft Production Under the War Production Board and Predecessor Agencies, May 1940 to April 1944" (1944) 4
Worsley, "Wartime Economic Stabilization and the Efficiency of Government Procurement" (1948) 6, 7